

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,	:	
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	:	
v.	:	16-CR-436 (KMW)
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	:	
STEVEN BROWN,	:	
	:	
Defendant.	:	
-----X	:	

**MEMORANDUM OF LAW IN SUPPORT OF
MOTION TO ALLOW DEFENSE COUNSEL TO REVIEW
GRAND JURY MINUTES OR, ALTERNATIVELY, FOR
THE COURT TO CONDUCT AN *IN CAMERA* INSPECTION**

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INTRODUCTION

Defendant Steven Brown respectfully submits this memorandum of law in support of his motion to allow defense counsel to review the grand jury minutes or, alternatively, for the Court to conduct an in camera review to determine whether the grand jury was mischarged or misled about the facts and/or law of this case.

Mr. Brown, along with David Williams and Gerald Seppala, was initially indicted in June 2016 for wire fraud and conspiracy to commit wire fraud, among other offenses. Both the Initial Indictment and the Superseding Indictment allege a series of wrongdoings whereby defendants solicited funds from stakeholders of various film projects in exchange for assurances that they would see returns on their investments.

There is compelling evidence, however, that the grand jury indictment was predicated on erroneous facts in order to fit the government's narrative that the "victims" were fooled by an elaborate "advanced fee scheme." Accordingly, there is strong reason to believe that the grand jury either was not properly charged with the facts or the law to allow it to evaluate the credibility of the victims or that the case was presented primarily through dubious and inaccurate hearsay testimony. Thus, the grand jury was misled and not given a fair opportunity to judge the victims' credibility nor the evidence before it.

BACKGROUND

The Press Release Contains Inaccurate Factual Statements

One of the main accusations publicly made by the government is that the movies in question were not actually made. In a press release on June 28, 2016, former U.S. Attorney for the Southern District of New York Preet Bharara made the following public statement:

"With lies about making feature-length films and documentaries, the defendants allegedly defrauded victims into investing over \$12 million with them. Rather than making movies, the defendants perpetuated an advance fee scheme, allegedly using the investors' money to pay themselves and pay other investors back."

FBI Assistant Director-in-Charge Diego Rodriguez said: "As alleged, Williams, Brown and Seppala didn't provide marketing expertise to feature films. . . . Any level of fraud to honest investors is wrong, whether it's fraud in the hundreds of dollars or million dollars.

(Affirmation of Walter Mack in support of motion to review grand jury minutes ("Mack Grand Jury Aff.") at ¶2, Ex. A) (emphases added).

In other words, U.S. Attorney Bharara's public statement was that the defendants simply took their investors' money and either abandoned the film projects for which the funds were

sought or deliberately and intentionally failed to make them. That assertion is demonstrably false. Indeed, summaries from the Internet Movie Database ("IMDB") prove that many of the films were not only developed and released, but also received acclaim from the defendants' contemporaries in the movie industry.

ARGUMENT

I.

THERE IS A PARTICULARIZED NEED FOR REVIEW OF THE GRAND JURY MINUTES

Rule 6(e)(3)(E)(ii) of the Federal Rules of Criminal Procedure provides that "[t]he court may authorize disclosure – at a time, in a manner, and subject to any other conditions that it directs – of a grand jury matter. . . at the request of a defendant who shows that a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury[.]" Such grounds exist here.

A. The Factually Inaccurate Press Release Provides a Particularized Need for Review

The district courts in this Circuit have held that a defendant seeking disclosure of grand jury materials must demonstrate a "particularized need" that outweighs the presumption of grand jury secrecy. United States v. Bruno, 159 F.Supp.3d 311, 322 (E.D.N.Y. 2016); see also United States v. Labate, 2001 WL 533714 at *20 (S.D.N.Y. May 18, 2001) ("To be entitled to disclosure of grand jury minutes, defendant must make a showing of 'particularized need' that outweighs the strong interest in maintaining the secrecy of grand jury proceedings."). A factual basis is required to meet the particularized need standard. Accord United States v. Broyles, 37 F.3d

1314, 1318 (8th Cir. 1994) (using particularized need standard); United States v. Puglia, 8 F.3d 478, 480 (7th Cir. 1993) (same).

In this case, Mr. Brown has made a "particularized and factually based" showing that grounds exist to support the proposition that irregularities occurred in the grand jury proceedings that justify review of the grand jury minutes. There is a strong likelihood that the grand jury proceedings were tainted by an inaccurate portrayal of the events giving rise to this action. Stated differently, it is likely that the grand jury was told precisely what the public was told in the press release, i.e., that the movies were never made, and that defendants simply used their investors' money as an "advance fee scheme" to pay themselves, while their alleged "victims" received nothing in return.¹ In fact, the Government knew or should have known that many of the films were indeed made, and that many investors were fully recompensed as a result of Mr. Brown's efforts on their behalf. From the prosecution's press release it is plain that the grand jury was presented with a theory of criminal liability that was not based on the true facts of the case. If, indeed, the grand jury had been informed that the films in question were produced, and that many of the so-called "victims" had been paid back as a result of Brown's efforts – Victim-2 in particular – it follows that the Initial Indictment and Superseding Indictment may never have been issued.

For this reason, the defense requests a review of the minutes and the charging instructions to determine whether the government proceeded under the "advance fee scheme" theory spouted

¹ According to the FBI's website, "[a]n advance fee scheme occurs when the victim pays money to someone in anticipation of receiving something of greater value—such as a loan contract, investment, or gift—and then receives little or nothing in return." <https://www.fbi.gov/scams-and-safety/common-fraud-schemes/advance-fee-schemes>

by Bharara. See e.g., United States v. Twersky, 1994 WL 319367 (S.D.N.Y. 1994) (granting request to review grand jury minutes in camera to determine whether instructions misled the grand jury and to better assess defendants “particularized need” argument); United States v. Bravo-Fernandez, 239 F.Supp.3d 411, 416 (D. P.R. 2017) (reviewing sufficiency of legal instruction to grand jury).

B. The Press Release Violates the Department of Justice’s Own Rules and Local Criminal Rules

The presumption of regularity that is accorded to grand jury proceedings may be dispelled upon particularized proof of irregularities in the grand jury process. United States v. R. Enters., Inc., 498 U.S. 292, 301 (1991). Here, the fact that Bharara’s extrajudicial statements violated Local Criminal Rules and the Department of Justice’s (“DOJ”) rules further demonstrates such irregularities and the resulting prejudice to Mr. Brown.

In its rules regarding the release of information relating to criminal cases, the DOJ provides that its personnel may make public certain facts, including “the substance or text of the charge” 28 C.F.R. § 50.2 (b)(3)(ii), but “[d]isclosures should include only incontrovertible, factual matters, and should not include subjective observations.” 28 C.F.R. § 50.2 (b)(3). The alleged fact that defendants engaged in an advance fee scheme “rather than make movies” is not incontrovertible; it is very much controverted because the statement is inaccurate.

DOJ regulations similarly state that “[o]bservations about a defendant’s character” and “[a]ny opinion as to the accused’s guilt” will “generally tend[] to create dangers of prejudice without serving a significant law enforcement function.” 28 C.F.R. § 50.2(b)(6)(i), (vi). And in the same vein, Local Criminal Rule 23.1(d) states that “opinion[s] as to the accused’s guilt or

innocence or as to the merits of the case or the evidence in the case” are matters that “presumptively involve a substantial likelihood” of interference with a fair trial or prejudice to the administration of justice. L.Crim. R. 23.1(d)(7). The inaccurate statements regarding the defendants’ films not being made and the use of an “advanced fee scheme,” side-by-side with the opinion in the press release about the “wrongness” of fraud, violated the rules and severely prejudiced Mr. Brown. See United States v. Silver, 103 F. Supp. 3d 370, 376 (S.D.N.Y. 2015).

In United States v. Silver, the court denied a motion to dismiss the indictment or to review the grand jury minutes based upon extrajudicial comments made by Bharara in a press release, among other things, that referred to the “culture of corruption” in Albany. In denying the motion to review the grand jury minutes, the court reasoned that “it could not have come as a surprise to any member of the grand jury. . . [that] the U.S. Attorney believed [defendant] to be guilty.” Id. at 381-82. Judge Caproni noted, however, that Mr. Bharara, while “castigating politicians for playing fast and loose with ethical rules . . . strayed so close to the edge of the rules governing his own conduct” that he almost “fell over the edge to the Defendant’s prejudice.” Id. at 373. In the instant case, Mr. Bharara finally fell over the edge, publicly misstating both the facts and the legal theory of the case to Mr. Brown’s prejudice.²

² Indeed, a Google search of “Steven Brown movies” turns up the Bharara press release on the first page of results. (Mack Grand Jury Aff. at ¶3).

II.

**IT IS UNCLEAR WHETHER THE VICTIMS
TESTIFIED BEFORE THE GRAND JURY
OR IF THE CASE WAS PRESENTED THROUGH HEARSAY**

Review of the grand jury minutes is also warranted because it is unclear whether any of the purported victims actually testified in front of the grand jury and, if so, whether the grand jury was apprised of the extortionate and other criminal conduct of the so-called victims themselves who utilized repeated threats to involve law enforcement participation in their litigation to extort large sums from the defendants. (See Affirmation of Walter Mack in support of accompanying motion to compel, affirmed December 15, 2017, at ¶¶ 8-16). If, on the other hand, the victims did not testify and the case was presented to the grand jury through hearsay testimony, the minutes should be reviewed to ensure the grand jurors were not misled about the witnesses' lack of personal knowledge. See United States v. Estepa, 471 F.2d 1132 (2d Cir. 1972) (dismissing indictment based on presentation to grand jury of hearsay account by witness with limited personal knowledge, which misled the grand jurors). Presenting a case of this complexity through hearsay evidence creates a real danger of misleading the grand jury, which is grounds for dismissal of the indictment. Id. at 1137; see also United States v. Ramirez, 482 F.2d 807. (2d Cir. 1973) (where it appears that grand jury has only heard hearsay testimony, under Estepa the minutes should be reviewed in camera to determine whether grand jury misled).

CONCLUSION

For the foregoing reasons, the defense requests that the Court allow defense counsel to review the grand jury minutes and the charging instructions, or, alternatively, that the Court

conduct an in camera review to determine whether the grand jury was misled, mis-charged or misinformed about the facts and/or law applicable to this case.

Dated: New York, New York
December 15, 2017

Respectfully submitted,

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